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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF VIRGINIA,
Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR *AMICUS CURIAE* FREEDOM TO READ FOUNDATION IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. STATUTES BURDENING ADULT ACCESS TO CONSTITUTIONALLY PROTECTED SPEECH IN ORDER TO SHIELD MINORS FROM THAT SAME SPEECH ARE NOT CONSTITUTIONAL UNLESS: A) THE LAW SUBSTANTIALLY FURTHERS THE STATE INTEREST IN PROTECTING MINORS, AND B) THE LAW DOES NOT SUBSTANTIALLY BURDEN THE FIRST AMENDMENT RIGHTS OF ADULTS	5
II. VIRGINIA'S DISPLAY LAW VIOLATES THE FIRST AMENDMENT BECAUSE IT IS NOT RESTRICTED TO THE NARROW INTEREST IDENTIFIED BY THE STATE, AND IMPOSES SUBSTANTIAL BURDENS ON THE FIRST AMENDMENT RIGHTS OF ADULTS	11
A. The State Has Essentially Conceded That The Display Statute, As Written, Is Not Reasonably Restricted To Furthering The Narrow Interest Identified By The State	11
B. The Virginia Display Law Is Also Unconstitutional Because It Imposes Substantial Burdens On The First Amendment Rights Of Adults	14
1. In Order To Comply With The Display Law, Persons Covered By The Statute Will Treat Virtually All Books And Other Materials Discussing or Depicting Sexuality Or Sexual Conduct As Subject To The Law's Requirements	15

TABLE OF CONTENTS—Continued

Page

2. The Burdens The Display Law Imposes On Speech Vastly Exceed Those Imposed By Sale To Minor Laws, And Will Substantially Burden The First Amendment Rights Of Adults 21

a. By limiting the manner in which speech can be displayed to adults, the statute impedes the "free flow" of constitutionally protected speech..... 21

b. By requiring bookstores and others covered by the law to determine prior to the point of sale which materials are subject to the statute, the display law substantially burdens First Amendment rights 24

III. LAWS RESTRICTING THE DISPLAY OF MATERIALS DEEMED "HARMFUL TO MINORS" THREATEN THE EXERCISE OF FIRST AMENDMENT RIGHTS IN THE NATION'S LIBRARIES 27

CONCLUSION 29

TABLE OF AUTHORITIES

CASES: Page

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) 19
American Booksellers Association v. Webb, 643 F. Supp. 1546 (N.D. Ga. 1986) ..... *passim*
American Communications Association v. Douds, 339 U.S. 382 (1950) 23
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 22
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 8, 22
Brockett v. Spokane Arcades, Inc., —— U.S. ——, 105 S. Ct. 2794 (1985) 17
Butler v. Michigan, 352 U.S. 380 (1957) 7
Carey v. Population Services International, Inc., 431 U.S. 678 (1977) 22
Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985) 9
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) ..... *passim*
Fare v. Michael C., 442 U.S. 707 (1979) 19
FCC v. Pacifica Foundation, 438 U.S. 726 (1978) .. 10, 11
Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 557 (1963) 23
Ginsberg v. New York, 390 U.S. 629 (1968) ..... *passim*
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 19
Hamling v. United States, 418 U.S. 87 (1974) 25
Jenkins v. Georgia, 418 U.S. 153 (1974) 17
Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986) .. 9
Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959) 17
Kovacs v. Cooper, 336 U.S. 77 (1949) 7
Lamont v. Postmaster General, 381 U.S. 301 (1965) 7, 23
Linmark Associations, Inc. v. Willingboro, 431 U.S. 85 (1977) 7
Miller v. California, 413 U.S. 15 (1973) 2, 17
NAACP v. Alabama, 357 U.S. 449 (1958) 23

TABLE OF AUTHORITIES—Continued

	Page
NAACP v. Button, 371 U.S. 415 (1963)	10, 23
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)	19
Renton v. Playtime Theatres, Inc., —— U.S. ——, 89 L.Ed.2d 29 (1986)	7
Roth v. United States, 356 U.S. 476 (1976)	27
Smith v. California, 361 U.S. 147 (1959)	23, 24
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)	29
State v. Hull, 86 Wash.2d 527, 546 P.2d 912 (1976)	25
Tattered Cover, Inc. v. Tooley, 696 P.2d 780 (Colo. 1985)	27
Wilkinson v. Jones, —— U.S. ——, 107 S.Ct. 1559 (1987)	9, 10
Young v. American Mini Theatres, 427 U.S. 50 (1976)	*passim*

STATUTES:

Ariz. Rev. Stat. Ann. § 13-3507	27
Va. Code § 18.2-390(6)	17
Va. Code § 18.2-390(7)	25

MISCELLANEOUS:

ALA Interpretation of the Library Bill of Rights (Jan. 27, 1982)	1
American Heritage Dictionary (2nd College Ed. 1982)	12
Attorney General's Commission on Pornography, *Final Report* (1986)	18
L. Constantine & F. Martinson, *Children and Sex* (1981)	19
M. Harmatz & M. Novak, *Human Sexuality* (1983)	18
Human Sexual Development (D. Taylor ed. 1970)	18
S. McCary & J. McCary, *Human Sexuality* (3d Ed. 1984)	18
E. Morrison, K. Starks, C. Hundman, N. Ronzio, *Growing Up Sexual* (1980)	18
F. Schauer, *The Law of Obscenity* (1976)	25

BRIEF FOR *AMICUS CURIAE* FREEDOM TO READ FOUNDATION IN SUPPORT OF APPELLEES

INTEREST OF AMICUS

The Freedom to Read Foundation (Foundation) was established in 1969 by the American Library Association (ALA), the oldest and largest library association in the world and the chief voice of the modern library movement in North America. A nonprofit organization, the ALA represents more than 45,000 librarians, library trustees, educators, and library institutions. The purposes of the nonprofit Foundation are to promote and defend First Amendment rights; to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; to support the right of libraries to include in their collections and make available to the public any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

Librarians have long been aware that government censorship can take many forms and is not limited to direct prohibitions on speech. The First Amendment safeguards speech not only against outright assaults, but also against the eroding force of regulation that burdens and inhibits access to speech. Recognizing the insidious effects of regulations that burden access to speech by imposing so called "inconveniences," the ALA has made protection of "the *free flow* of information and ideas . . . [t]he central thrust of the Library Bill of Rights." *ALA Interpretation of the Library Bill of Rights* (Jan. 27, 1982). *Accord Young v. American Mini Theatres*, 427 U.S. 50, 77 (1976) (Powell, J., concurring) ("[The central concern of the First Amendment . . . is that there be a free flow from creator to audience of whatever message a film or a book might convey."). The Foundation is participating in this case because Virginia's display law is fundamentally at odds with this principle.

The Foundation is also participating because it is gravely concerned that if Virginia's display law is found

constitutional, states and localities will impose similar restraints on display of speech materials in the Nation's libraries. Although Virginia's law is limited to display for "commercial purposes," similar laws encompass libraries as well. *E.g.*, Ariz. Rev. Stat. Ann. § 13-3507. And if Virginia's law is upheld, states would almost certainly be free to impose the same burdens on libraries (indeed, some courts have held that the equal protection clause forbids states from creating special exemptions for libraries). This concern is not chimerical. History has shown that if a community will not tolerate certain speech in privately owned places such as bookstores, it will not show greater tolerance toward similar speech in public libraries.

INTRODUCTION AND SUMMARY OF ARGUMENT

During its long struggle to develop a workable test for obscenity, the Court has frequently emphasized that state obscenity statutes "must be carefully limited" to avoid burdening or chilling constitutionally protected speech. *E.g.*, *Miller v. California*, 413 U.S. 15, 23-24 (1973). The danger to First Amendment values is even greater when states attempt to regulate speech that is not obscene for adults and thus is constitutionally protected, but is deemed "harmful to minors." Because such regulation is not limited to hard core depictions of specifically defined sexual conduct, it can arguably encompass any speech concerning human sexuality, including a vast amount of constitutionally protected speech.

In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court upheld a statute that prohibited the sale to minors of materials "harmful to minors" but imposed no burden on adult access to this speech. In contrast, Virginia's display statute directly burdens adult access to constitutionally protected speech by making it a criminal offense to display to adults materials deemed "harmful to minors" in any manner "whereby juveniles may examine and peruse" the material. Although the State concedes that its interest in the display statute is far narrower than

the interest asserted in *Ginsberg*, the burden the statute imposes on the First Amendment rights of adults is immeasurably greater.

In *Point I*, we will show that this Court has upheld regulations that burden the First Amendment rights of adults in order to shield minors from harmful speech only in very limited circumstances. To satisfy the First Amendment, such laws must meet both of the following requirements. First, the law must substantially further the state's interest in protecting minors from speech that is harmful to them. Second, the law must be "reasonably restricted" to furthering that interest. If the law instead substantially burdens the First Amendment rights of adults, it is unconstitutional.

The Court need not decide in this case whether a state could ever pass a display law that meets these requirements, for it is quite clear that Virginia's display statute is not reasonably restricted to furthering the interest identified by the State. As explained in *Point II.A*, the State has effectively conceded that its display statute was *not* passed to prevent momentary review of any sexually explicit materials by minors; instead the State is concerned about a "miniscule" amount of sexually explicit materials, and the statute's purpose is to prevent detailed inspection of these materials that may result from ostentatious displays. While narrowly defining the purpose of the statute, the State has also conceded that the literal terms of the statute are far more encompassing than necessary to accomplish this narrow state interest. The State's argument then collapses into a contention that its display statute is "reasonably restricted" because the statute's literal language can be disregarded by employing a "narrowing construction"—a contention that is little more than an invitation for this Court to rewrite the statute. Based on the State's concessions, this Court should strike down the Virginia statute on the ground that it is not reasonably restricted to the State's asserted interest.

In *Point II.B*, we will show that the Virginia statute is also unconstitutional because it substantially burdens the First Amendment rights of adults. Initially, it should be understood that as a practical matter compliance with the statute requires that virtually all material discussing or depicting sexuality or sexual conduct be treated as subject to its prohibitions. It would be impossible even for experts to determine which books and other materials with sexually explicit discussions are "harmful" to the "average" minor. When required to make this highly uncertain judgment about each of the thousands of books in a bookstore's ever-changing inventory that include some sexually explicit portions, many persons covered by the statute will simply choose to treat most, or all, materials with sexually explicit portions as subject to the statute's requirements. *Point II.B.1.*

In *Point II.B.2*, we will show that the burdens the display law imposes on speech subjected to its requirements vastly exceed those imposed by "sale to minor" laws. First, in contrast to sale to minor laws (which impose no burden on adults), the display law effectively requires bookstores and other persons covered to conspicuously identify materials subject to the statute's requirements as "Sexually Explicit—Harmful to Minors—For Adults Only," and then forces adults who wish to examine or purchase these materials to make their interest in sexually explicit material obvious to other patrons of those establishments. The statute thus directly impairs the "free flow" of constitutionally protected speech, *Young v. American Mini Theatres*, 427 U.S. 50, 77 (1976) (Powell, J., concurring), and substantially burdens and inhibits the exercise of First Amendment rights by adults. *Point II.B.2.a.* Second, although bookstores can comply with sale to minor laws by deciding *at the point of sale* whether particular materials being purchased by a minor are subject to the statute (and, if permitted by the statute, can take the minor's age into account), Virginia's display law requires that this determination be made about every book, magazine and other publication in a

bookstore's constantly changing inventory *prior to display*. It thereby imposes extraordinary burdens on the constitutionally protected activities of persons covered by the statute. *Point II.B.2.b.*

In *Point III*, we will explain that the issue raised in this case is a matter of grave concern to the nation's libraries and librarians. Although Virginia's statute directly restricts only displays for "commercial purposes," the parties have not argued that the limitation to commercial purposes is of constitutional significance. Accordingly, if Virginia's display statute is found constitutional, Virginia and other states may consider themselves free to impose the same burdens on public libraries (as some states have already done). In limiting its statute to commercial displays, Virginia has implicitly recognized that the imposition of such burdens on libraries is completely antithetical to the purposes of libraries. This Court should find that the imposition of those burdens on constitutionally protected activities, whether undertaken by libraries, bookstores or other persons, violates the First Amendment.

ARGUMENT

I. STATUTES BURDENING ADULT ACCESS TO CONSTITUTIONALLY PROTECTED SPEECH IN ORDER TO SHIELD MINORS FROM THAT SAME SPEECH ARE NOT CONSTITUTIONAL UNLESS: A) THE LAW SUBSTANTIALLY FURTHERS THE STATE INTEREST IN PROTECTING MINORS, AND B) THE LAW DOES NOT SUBSTANTIALLY BURDEN THE FIRST AMENDMENT RIGHTS OF ADULTS.

In the State of Virginia's view, because it is constitutional to forbid selling to minors material that is "harmful to minors," *Ginsberg v. New York*, 390 U.S. 629 (1968), it necessarily must be constitutional to restrict the manner in which that material is displayed to adults and minors. This view ignores a fundamental difference between sale to minor laws, and display laws. A law forbidding the sale of certain material to minors does not burden adult access to those materials. Thus, in

Ginsberg there was no claim that a burden on the First Amendment rights of adults had been imposed. In contrast, Virginia's display statute directly burdens adult access to constitutionally protected speech by making it a criminal offense to display, either to adults or minors, material covered by the statute in any manner "whereby juveniles may examine and peruse" the material. The issue now before the Court is whether the burden this imposes on the First Amendment rights of adults violates the First Amendment.

This Court has on several occasions addressed the constitutionality of laws that burden the First Amendment rights of adults in order to shield minors from speech that is constitutionally protected for adults, but not for minors. In those cases, the Court has upheld the government regulation *only* if two requirements are satisfied. First, the law must substantially further the state's interest in protecting minors from speech that is harmful to them. Second, the law must be "reasonably restricted" to furthering that interest. If the law is not so restricted, and instead substantially burdens the First Amendment rights of adults, it violates the First Amendment.[1]

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[1] Appellant argues that this Court should analyze Virginia's display statute using the test that the Court has applied to time, place and manner restrictions. Recognizing that such restrictions cannot be based on the content of speech, *see, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975), appellant argues that Virginia's law is not intended to regulate the content of speech. This argument is unfounded for two reasons.

First, Virginia's statute plainly *is* content-based. The statute was enacted because of concern about the effects of speech having a certain content, and the statute's prohibition directly applies to speech having that content. Appellant's argument is really no more than a contention that this is a *permissible* content-based regulation because it is intended to protect children from harmful speech content; that argument does not warrant the conclusion that the statute is not content-based.

Second, appellant's suggestion that the display law is a "manner" restriction and should be reviewed using a less rigorous standard misconceives this Court's prior decisions concerning "manner" regulations. Although many regulations might be classified as "man-

Thus, in *Butler v. Michigan*, 352 U.S. 380 (1957), the Court reversed a defendant's conviction under a Michigan statute prohibiting the sale of "obscene, immoral, lewd or lascivious materials" that tended to "incite minors to violent or depraved or immoral acts" or manifestly tended to be morally corrupting. The trial judge had determined that the materials sold by the defendant had a "potentially deleterious influence upon youth." When the defendant appealed to this Court, the State argued that forbidding sale of such materials to adults, as well as minors, was required to prevent minors from having access to speech that was harmful to them. Without questioning the State's claim that the statute substantially furthered the state interest in protecting minors, the Court determined that the statute was "not reasonably restricted to the evil with which it is said to deal." 352 U.S. at 383. Because the statute also prevented *adult* access to speech that was constitutionally protected for adults, the Court unanimously ruled that it violated the First Amendment. 352 U.S. at 383.

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ner" restrictions in some sense of the word—including regulations that require speech to be inaudible, or in a foreign language—the Court has not used the time, place and manner test unless the "manner of the speech produces a detrimental 'secondary effect' on society," and the speech is not being regulated because of fear of its 'primary' effect"—that is, the effect the speech will have upon "those receiving the information." *Linmark Associations, Inc. v. Willingboro*, 431 U.S. 85, 94 (1977). Thus, the test has been used where the manner of speech caused secondary effects such as excessive noise, *Kovacs v. Cooper*, 336 U.S. 77 (1949), or neighborhood deterioration, *Renton v. Playtime Theatres, Inc.*, —— U.S. ——, 89 L.Ed.2d 29 (1986), *but it is clearly inapplicable to regulations designed to control the allegedly harmful effects that the speech itself may have on some people* (in the case of Virginia's display law, the effect of certain speech on minors). *See, e.g., Linmark*, 431 U.S. at 94; *Erznoznik* (reviewing ordinance restricting display of speech on drive-in theatre screens visible from public streets, Court did not suggest this was merely a "manner" restriction); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (reviewing statute providing that certain mail would only be forwarded to addressee upon receipt of written request from addressee, Court again did not suggest that this was a "manner" restriction).

In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Court reviewed an ordinance prohibiting drive-in theatres from showing films containing nudity on screens visible from public streets or other public places. To comply with the statute, drive-in theatres either had to prevent public display of such films—for example, by building fences to prevent viewing from public streets—or discontinue showing such films. The City of Jacksonville argued that the statute was "a reasonable means of protecting minors from this type of visual influence."[2] Despite the city's assertion of that interest, and despite the fact that the ordinance obviously furthered that interest and did not burden adult access to such films in theatres other than drive-ins, the Court found the ordinance facially unconstitutional. Although the ordinance did not prohibit drive-in theatres from showing films covered by the ordinance, but simply required that the films not be displayed on screens visible from public places, the Court recognized—without requiring supporting evidence in the record—that as a practical matter theatres would discontinue showing films covered by the statute to avoid this burden. Because many of these films were constitutionally protected for minors as well as for adults, the ordinance's restriction was "broader than permissible." 422 U.S. at 213.

In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court again struck down a statute that burdened the First Amendment rights of adults in order to protect minors from supposedly harmful speech. The Court held that a statute prohibiting unsolicited mailing of contraceptive advertisements violated even the less stringent First Amendment standard applicable to commercial speech. Although the interest asserted by the state—"aiding parents' efforts to discuss birth control with their children"—was "undoubtedly substantial," the Court found that the statutory "means of effectuating this interest . . . provides only the most limited incre-

[2] Much of the film material encompassed by the Virginia display law probably was also covered by the Jacksonville ordinance.

mental support for the interest asserted." 463 U.S. at 73. The Court questioned the claim that many children had unrestricted access to material in the mailbox, and also reasoned that even if children had such access, parents already had to "cope with the multitude of external stimuli that color their children's perception of sensitive subjects." 463 U.S. at 73. Thus, the statute provided only a "marginal degree of protection" for the state's interest, and did not substantially further that interest. *Id.* Moreover, the statute was not "reasonably restricted" to advancing that state interest, but also burdened adult access to material "entirely suitable for adults" by prohibiting unsolicited mailings. *Id.* at 73-74. Although the statute did not prevent adults from having access to this material if they requested it, the Court concluded that the First Amendment did not allow the government to impose even this burden on adults. 463 U.S. at 69 n.18. As *Bolger* makes clear, if a statute does not substantially further the state's interest in protecting minors, even a minimal burden on adult access to unsolicited *commercial* speech violates the First Amendment.

Most recently, in *Wilkinson v. Jones*, 107 S. Ct. 1559 (1987), the Court was asked to review the Tenth Circuit's holding that a nuisance statute punishing cable television programming that depicted "indecent material" violates the First Amendment and is preempted by federal law. The District Court in *Wilkinson* rejected the state's contention that the statute was constitutionally permissible because it furthered the state's interest in protecting minors from harmful material. The Court reasoned that the statute did not substantially further the state's interest, and would prevent adults from exercising their First Amendment rights. *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985). The Court of Appeals adopted the reasoning of the District Court and affirmed. *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986). The state appealed to this Court, again arguing, *inter alia*, that the statute was necessary to prevent children from hav-

ing unsupervised access to indecent material. This Court summarily affirmed the lower court's decision. *Wilkinson v. Jones*, 107 S. Ct. 1559 (1987).

Underlying the holdings in *Butler*, *Erznoznik*, *Bolger* and *Wilkinson* is the recognition that First Amendment rights are "supremely precious in our society." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Thus, when the government burdens the First Amendment rights of adults for the asserted purpose of protecting minors from "harmful" speech, this asserted interest is not treated as a talisman but instead is subjected to the closest scrutiny. Unless the government regulation substantially furthers the state interest in protecting minors, and does so without imposing a substantial burden on the First Amendment rights of adults, this Court has uniformly held that the regulation violates the First Amendment.

Indeed, the *only* case in which the Court has found that a government regulation burdening the First Amendment rights of adults did substantially further the government interest in protecting minors and only insubstantially burdened the rights of adults, is *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In that case, the Federal Communication Commission had issued an order holding that a radio station's broadcast of a profane monologue in the early afternoon violated federal law; no formal sanctions were imposed, but the order was placed in the station's file and the station was warned against future violations. The Commission emphasized that the monologue was "broadcast at a time when children were undoubtedly in the audience," and that its order was a response to that "specific factual context" and was "never intended to place an absolute prohibition on the broadcast of this type of language." 438 U.S. at 732-33. Upholding the Commission's action in the context of this regulated industry, the Court emphasized that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and this media was "uniquely accessible to children, even those too young to read." 438 U.S. at 749.

In these circumstances, the Commission's regulation of profane broadcasting, which imposed no burden on broadcasts in evening hours, was found constitutionally permissible.[3]

In sum, only in the context of a regulated industry has this Court tolerated burdens on the First Amendment rights of adults imposed to protect minors from harmful speech, and even then, the restrictions were limited to certain hours during the day. As we will show in the following section, Virginia's display law is *not* reasonably restricted to the interest identified by the State, and *does* impose substantial burdens on the First Amendment rights of adults.

II. VIRGINIA'S DISPLAY LAW VIOLATES THE FIRST AMENDMENT BECAUSE IT IS NOT RESTRICTED TO THE NARROW INTEREST IDENTIFIED BY THE STATE, AND IMPOSES SUBSTANTIAL BURDENS ON THE FIRST AMENDMENT RIGHTS OF ADULTS.

A. The State Has Essentially Conceded That The Display Statute, As Written, Is Not Reasonably Restricted To Furthering The Narrow Interest Identified By The State.

Relying on this Court's holding in *Ginsberg* that government has an important interest in preventing unlimited sale to minors of materials that are "harmful to minors," the State argues that its display statute is required to substantially further a compelling state interest. A more careful review of the State's position, however, reveals that the interest being asserted by the State is extremely narrow. Indeed, throughout this litigation the State has made it extremely clear that it has *no* interest in prohibiting the broad range of speech covered by the terms of its display statute. And it has effectively conceded that the much narrower interest it does assert could be protected by a much narrower stat-

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[3] The Court also emphasized the "narrowness" of its holding, 438 U.S. at 750, and later reiterated in *Bolger* the narrowness of *Pacifica*'s holding. 463 U.S. at 74.

ute. This Court, like the courts below, should reject the State's invitation to rewrite and narrow the reach of its statute, and should find the statute unconstitutional based on the State's concession that its display statute is not reasonably restricted to furthering the interest identified by the State.

In explaining what the display statute is intended to regulate, the State has very narrowly defined its interest. First, although it is clear from the findings of fact in this case that a substantial percentage of the books and other inventory in an average bookstore have some material that is sexually explicit, concerns human sexuality or could otherwise be deemed "harmful to minors" under laws such as Virginia's statute, 617 F. Supp. at 702, the State has steadfastly maintained that it is concerned only about preventing display of a "miniscule" portion of this inventory. App. Br. at 16, 27, 29. Thus, it is quite clear that the State does *not* believe that the display of most sexually oriented materials is intrinsically, or even usually, "harmful to minors." The State's interest is restricted to preventing display of a very limited subset of that material.

Second, the State concedes that "not every display" of even this "miniscule" subset should be deemed illegal under the statute. App. Br. at 35. Although the statute by its terms prohibits display of harmful materials in any manner "whereby juveniles may examine and peruse" them, the State now claims that the statute should not be read "literally" and does *not* prohibit display of materials in a manner whereby minors "might" examine and peruse them. According to the State, it is interested in prohibiting *only* displays that create a "reasonably certainty" that the materials will be "'inspect[ed] in detail'" and "'analyze[d] carefully'" by minors.[4] Because only the most ostentatious displays could create a "reasonable certainty" of detailed inspection and analysis by minors, it is clear that the State is not concerned that

[4] *Id.* at 35 & n.9 (quoting *American Heritage Dictionary* (2nd College Ed. 1982)), 36.

routine shelving and display of even the core of harmful materials it has identified will cause harm to minors. Nor is the State concerned that fleeting glances, or momentary inspection, of those materials will cause harm to minors.

Third, after restricting its interest to protecting minors from ostentatious displays of a "miniscule" amount of sexually explicit materials, and urging that the statute be construed accordingly, the State urges this Court to further rewrite and limit the statute in a manner that would render it largely unenforceable. The State argues that those covered by the statute can "comply with [the law] without significantly interfering with [their] business practices" because, according to the State, bookstores need not segregate materials "harmful to minors" outside the reach of minors. *Id.* at 29. The State maintains that the statutes merely requires bookstores to place "warning tags . . . on the materials in question" or "color code[]" such materials. *Id.* It is obvious, and the lower court expressly found, that construed in this manner the statute "would not stop any determined juvenile from examining and perusing the materials" covered by the statute. 792 F.2d at 1266. Thus, the State's interest in the display statute is so minimal that it urges a facially implausible statutory construction that practically nullifies the statute's intended purposes. *See Point II.B.2.a., infra.*

Although the State has thus identified a very slight interest in regulating the display of a small subset of sexually oriented material in this manner—and in several places has indicated statutory language that could have been used to restrict the statute to achieving this interest—the reach of the statute is obviously not so limited. The statute is not restricted to prohibiting displays that create a "reasonable certainty" of "inspect[ion] in detail" by minors. Instead it prohibits displaying materials in *any* manner "whereby juveniles may examine and peruse" those materials. And persons covered by the statute cannot comply with the law by em-

ploying "warning tags" or "color coding," because if such actions are taken minors still "may examine and peruse" materials. Nor has language been employed that would restrict the statute to the "miniscule amount" of sexually oriented material about which the State professes concern. To the contrary, as shown *infra*, on its face the statute arguably encompasses virtually all sexually oriented material. In short, the State's contention that the statute can be construed as furthering only the very narrow objective identified by the State is nothing more than a request that the Court disregard in numerous respects the statute's literal language and radically rewrite the statute. In *Erznoznik*, this Court rejected an invitation to rewrite an overbroad statute, finding that the plain language of the statute was "not easily susceptible" to a narrowing construction. 422 U.S. at 216-17. *See also Webb*, 643 F. Supp. at 1554. Precisely the same result is required here.

B. The Virginia Display Law Is Also Unconstitutional Because It Imposes Substantial Burdens On The First Amendment Rights Of Adults.

We have shown that Virginia's display law is unconstitutional because the State has effectively conceded that it has only a limited interest in regulating this type of speech and could have accomplished its limited interest with a much narrower statute. Furthermore, even if the State had asserted a very broad interest in protecting minors from harmful speech, and even if this statute substantially furthered that interest as to minors, which it does not, the statute would still be unconstitutional because it substantially burdens the First Amendment rights of adults.

This Court has long struggled to limit the chilling effects of obscenity laws on protected speech. Regulation of material that is "harmful to minors" poses greater dangers to First Amendment values. Because such regulation is not limited to hard core depictions of specifically defined sexual conduct, it can arguably encompass almost any sexually oriented material, the overwhelming ma-

jority of which is constitutionally protected speech. In permitting states to prohibit *sales* to minors of material defined as harmful to them in *Ginsberg*, this Court upheld a statute that had no effect on the First Amendment rights of adults. The statute at issue there permitted booksellers to make judgments about the "harmful" nature of particular works at the *point of sale*, rather than forcing them to make advance determinations about their entire inventory. As the following discussion shows, Virginia's display law imposes immeasurably greater—and constitutionally impermissible—burdens on the First Amendment rights of adults.

1. ***In Order To Comply With The Display Law, Persons Covered By The Statute Will Treat Virtually All Books And Other Materials Discussing or Depicting Sexuality Or Sexual Conduct As Subject To The Law's Requirements.***

Compliance with the Virginia statute, as written, requires that virtually all material discussing or depicting sexuality or sexual conduct be treated as subject to its prohibitions. Even if persons covered by the statute had substantial resources and expertise in child sexuality—which they do not—it would be extraordinarily difficult for them to determine which of the materials in their establishments will be ruled by judges or juries to be "harmful" and therefore covered by the statute. Accordingly, instead of engaging in a laborious effort that would result in only the most uncertain and risky judgments, persons covered by the statute can be expected to avoid this futile undertaking and minimize the risk of prosecution, conviction and punishment by applying the statute's restrictions to most, and in many cases all, speech that includes discussions or depictions of sexuality or sexual conduct.

In the proceedings below, the district court made a factual finding, based upon the testimony of two local bookstore owners and a "careful review[]" of the exhibits, that "a significant percentage of materials (varying between 5-25%)" carried by an average general book-

store in Northern Virginia "are 'harmful to minors' as defined by the statute." 617 F. Supp. at 702. These materials included books covering "a wide variety of subject matters, such as romance, fiction, photography, best sellers, science fiction and health." *Id.* Most of these books came within the statute because of their written content. *Id.*[5]

The State has not explained how persons covered by the statute can confidently determine which materials with sexually explicit discussions are "harmful to minors." Nor did the State introduce any evidence to support its conclusory statements about the statute's limited scope. Instead, the State itself points out the uncertainties inherent in the statute by questioning appellees' witnesses on the ground that they were unaware of what the statute meant by "harmful to minors." This approach grossly misses the crucial point: bookstore owners will be uncertain about the meaning of the law, and will apply it to a substantial percentage of their inventory. Fear of criminal prosecution will only widen, not narrow, the effect that the statute will be given. Moreover, the trial judge in this case, fully apprised of the State's arguments that the statute's reach is more limited than a literal reading would imply, determined that the law *does* apply to a very substantial percentage of the material carried by an average bookstore. When a federal judge concludes that as much as 25% of the inventory in general interest bookstores is in fact covered by the law, bookstore owners—faced with the possibility of criminal penalties if they incorrectly decide materials are not "harmful to minors"—will reach similar or yet more censorious conclusions.

Furthermore, the State has not seriously disputed the fact that a very high percentage of books and other

[5] Similar factual findings were made in *American Booksellers Association v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986), where the court determined that "a significant percentage of adult reading material" was encompassed by a similar display statute and that "as a practical matter" the statute "would drastically reduce adults' selection of reading material." 643 F. Supp. at 1550.

reading, as well as viewing, materials include some sexually explicit discussions or depictions. For several reasons, persons covered by the display law cannot practically determine which of these sexually explicit materials are not subject to Virginia's display statute.

Initially, in contrast to obscenity statutes (which can only regulate materials that depict or describe " 'hard core' sexual conduct specifically defined by the regulating state law" [6]), Virginia's display law applies to any material that depicts or describes sexually explicit nudity, sexual conduct, or sexual excitement, and, taken as a whole, satisfies Virginia's three part definition of "harmful to minors." That definition, paraphrased, encompasses any of this material that: a) predominantly appeals to juveniles' shameful or unhealthy interest in sex; b) is patently offensive to community standards of what is suitable for juveniles; and c) lacks serious value for juveniles.[7]

Applying this three-part test to determine whether sexually explicit material is "harmful to minors" poses extraordinary problems. There is no consensus among experts, or the general public, about which childhood interests in sexuality are "healthy" and which are not, or about when and how sexually explicit information, whether educational or otherwise, should be made available to minors. Many people would argue that *any* material describing sexual conduct prior to adulthood, or outside of marriage, appeals to "unhealthy" interests in sex, and that it offends community standards to describe such conduct to minors.[8] Further, persons covered by the stat-

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[6] *Miller v. California*, 413 U.S. 15, 27 (1973); *see Jenkins v. Georgia*, 418 U.S. 153 (1974).

[7] *See* Va. Code § 18.2-390(6); *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794 (1985) (explaining meaning of "prurient interest" in sex).

[8] *See, e.g., Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959) (reviewing statute restricting speech "which approvingly portrays an adulterous relationship, quite without reference to the manner of its portray," 360 U.S. at 688). In fact, the Meese Com-

ute cannot be confident that material will be protected by the third prong—exempting materials with serious value for minors—because the value of any particular material might be found "beyond the comprehension of most minors." *Webb*, 643 F. Supp. at 1550. Faced with these problems, even an expert would have great difficulty deciding which sexually explicit materials do or do not meet the statute's definition of "harmful to minors."

These difficulties are greatly compounded by the fundamental differences among minors in different age groups.[9]

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mission on Pornography suggested that many people would even find it harmful to depict "a loving married couple engaged in mutually pleasurable and procreative" intercourse, because *any* public discussion of sex in a book or magazine "changes its character" and makes it a "public rather than private" act. Attorney General's Commission on Pornography, *Final Report* 340 (1986).

[9] Experts have long understood that sexuality begins to develop very early in childhood. A leading treatise on sexuality explains this deevlopmental process as follows: (1) "Sexuality is an integral and important part of our lives from the earliest day of infancy. Infants will curiously explore their bodies, fondle their genitals, engage in masturbation, and relate to others in sensual, intimate, or erotic ways." (2) "By age two or three children become aware of their gender"; they begin "to identify with their same-sex parent" and begin to "develop the gender-appropriate roles endorsed by the culture." (3) "By late childhood many children play games where they even fantasize being involved in marriage and family relationships. They may even express a desire for a brief period, to marry their opposite-sex parent." (4) Although children between the age of six and twelve are often thought "to be in the latency period of development . . . sexual development and interests are hardly dormant during this period. Children gain experience with masturbation and engage in sexual exploratory activities with same-sex and opposite-sex peers." (5) "In adolescence, the physical and hormonal changes of puberty occur. . . . First experiences with adult forms of sexual expression . . . may occur." S. McCary & J. McCary, *Human Sexuality* (3d Ed. 1984). *See also* M. Harmatz & M. Novak, *Human Sexuality* (1983); E. Morrison, K. Starks, C. Hundman, N. Ronzio, *Growing Up Sexual* (1980); *Human Sexual Development* (D. Taylor ed. 1970).

Apart from this basic understanding of child sexual development, however, this subject matter is one of substantial uncertainty and

The significance of these differences has been recognized by this Court,[10] as well as the Virginia legislature. Before passing the display law, the legislature expressly permitted retailers to consider the relative maturity of a minor in deciding whether to sell that minor a particular book or other material. The display law does not permit such individualized judgments. To comply with the law persons subject to the statute must either stop displaying materials if it is harmful to minors of *any* age group, or attempt to make a determination based on a hypothetical "average" minor. Because the differences between minors of different age groups are so fundamental—with respect to their sexual development, their capacity for informed choice, and even their ability to read—the latter approach is meaningless in this context.[11] A prudent person must assume that material would be covered by the statute if it would be harmful to *any* minor. Thus, if material would not be harmful to a 17-year old, but could be harmful to a five-year old, it would have to be treated as "harmful" under the statute (even though there is little risk that a five-year old would actually peruse the material). To determine whether particular material is "harmful," persons covered by the statute will have to determine the material's varying impact on minors of different

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disagreement among experts, as well as lay people. In particular, there is nothing approaching a consensus about which information and ideas, introduced at different ages, will lead to development of a healthy, or unhealthy, understanding of sexuality. *See, e.g.*, L. Constantine & F. Martinson, *Children and Sex* p. x (1981).

[10] *See, e.g., Erznoznik*, 422 U.S. at 21 n.11; *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 440 (1983); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608 (1982); *Fare v. Michael C.*, 442 U.S. 707, 727 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976).

[11] There is no practical way to hypothesize about an "average" minor, and determine which sexually explicit materials may be harmful to that minor. How, for example, is a bookseller to "average" a 17-year old minor and a 4-year old minor who cannot even read, and determine whether the written material in a book is harmful to this "average" minor? The statute provides no guidance on such issues.

ages, and treat the material as subject to the statute's requirements if it may be harmful to minors of any age.

For these reasons, it would be virtually impossible—even with substantial resources and expertise—to separate with any degree of accuracy sexually oriented materials that are "harmful" and thus covered by the statute from those that are not. And as a practical matter, booksellers and other persons covered by the statute have neither the resources, nor expertise, to even attempt to make this determination about their entire, constantly changing, inventory.[12] Because of the extraordinary time and expense required to make difficult and highly uncertain judgments about which particular books and other materials are "harmful to minors," the statute effectively compels booksellers simply to treat *all* materials that deal with sexuality as subject to the statute's requirements.[13]

In sum, although the State asserts an interest in restricting minors' access to a "miniscule amount" of books and other speech, its display statute sweeps far more broadly. Whether persons covered by the statute painstakingly attempt (at their peril) to determine which of their inventory conceivably could be considered "harmful to minors," categorically treat all materials with sexually explicit portions as covered, or simply restrict entire categories of literature, it is clear that a very broad range of constitutionally protected speech which the State has disclaimed any interest in regulating will be subjected to the display law's requirements.

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[12] Plaintiff Ampersand Books, for example, carries approximately 12,000 to 13,000 different books at any one time. In fact, there are "[a]pproximately 500,000 books . . . in print at any given time, and 50,000 new books are published every year. Obviously, bookstore owners cannot hope to read more than a minimal percentage of the book they stock." *Webb*, 643 F. Supp. 1550.

[13] Indeed, as we explain in Point II.B.2.b., *infra*, even if applied in this way, the statute imposes a substantial burden on booksellers, because booksellers will still have to review their entire inventory to determine which books have sexually explicit content.

2. *The Burdens The Display Law Imposes On Speech Vastly Exceed Those Imposed By Sale To Minor Laws, And Will Substantially Burden The First Amendment Rights Of Adults.*

a. *By limiting the manner in which speech can be displayed to adults, the statute impedes the "free flow" of constitutionally protected speech.*

Virginia's display statute makes it unlawful to display covered material to adults in any manner "whereby juveniles may examine and peruse" it. Notwithstanding the State's strained argument that there are many ways to comply with this statute, at the very least the statute clearly requires that all material it covers be identified, and an effective barrier be created to guard against the possibility that the material will be "examined" by minors. Whether this barrier takes the form of sealed wrappers on books and magazines, "adults only" sections in bookstores, or some other conspicuous form, the effect is the same: speech covered by the statute must be conspicuously identified as "Sexually Explicit—Harmful to Minors—For Adults Only." Adults who wish to examine or purchase those materials are thereby forced to make their interest in sexually explicit material obvious to other patrons.

Short of discontinuing sale of materials covered by the statute or barring minors from the premises entirely, the statute presents only two sure ways to comply: Placing all materials subject to the statute in a conspicuously designated "adults only" section of the establishment (and barring minors from that section), or sealing all such materials with wrapping. The lower court found as a fact that "many adults would be reluctant and embarrassed to browse in an 'adults only' corner of the store, and sales of books in this area would undoubtedly drop." 617 F. Supp. at 703. For exactly the same reason, many adults would be inhibited from purchasing in public material that is sealed because of its sexually explicit

nature.[14] The lower court's finding that such practices inhibit the exercise of First Amendment rights is well grounded in human experience: for many if not most people, sexuality and interest in sexuality is an extremely personal and private matter—forced to choose between conspicuously revealing that interest in public or foregoing First Amendment rights, many people will do the latter.

Justice Powell's concurrence in *Carey v. Population Services International, Inc.*, 431 U.S. 678 (1977), expressly recognized that laws requiring constitutional freedoms relating to sexuality to be exercised in public severely and impermissibly burden those freedoms. Although a law prohibiting mail purchases of contraceptives would prevent minors under age 16 from having unrestricted access to contraceptives, Justice Powell explained that this law also forced adults to purchase contraceptives in a public manner. He concluded that by publicizing this conduct, the law "heavily burdens constitutionally protected speech," and therefore was unconstitutional. 431 U.S. at 711. Because Virginia's display law conditions access to sexually explicit books and other materials in bookstores on the patron's willingness, in public, to express interest in materials conspicuously identified as sexually explicit, it also severely and impermissibly "burdens constitutionally protected freedom."

The State argues that display laws impose merely an inconvenience, leaving "ultimate access" to constitutionally protected speech unimpaired. The same argument was made and rejected in *Erznoznik* and *Bolger*, and it should be rejected here. This Court has long recognized that "[i]t is characteristic of the freedoms of expression . . . that they are vulnerable to gravely damaging yet barely visible encroachments." *Bantam Books, Inc. v.*

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[14] Even if the statute is "narrowly construed" as urged by the state, materials would have to be marked or placed in locations, e.g., blinder racks, that identify them as sexually explicit. Such an approach would impose the same stigma imposed by the more effective ways to ban access by minors.

Sullivan, 372 U.S. 58, 66 (1963). *See also NAACP v. Button*, 371 U.S. 415, 433 (1963) (First Amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society"). Consequently, this Court has condemned government regulation which has the "effect of *inhibiting the freedom of expression, by making the individual the more reluctant to exercise it.*" *Smith v. California*, 361 U.S. 147, 151 (1959) (emphasis added).[15]

These principles are fully applicable to constitutionally protected speech in bookstores and other establishments where the First Amendment guarantees "free access of the public to [this] expression." *Young v. American Mini Theatres*, 427 U.S. 50, 77 (1976) (Powell, J., concurring). Indeed, 'the central concern of the First Amendment in this area is that there be a *free flow* from creator to audience of whatever message a film or a book might convey." *Id.* (emphasis added). This "free flow" is precisely what is impaired by Virginia's display statute, which imposes a substantial burden on adult access to a wide range of protected speech. The imposition of that burden plainly violates the First Amendment.

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[15] In *Lamont v. Postmaster General*, 381 U.S. 301 (1965), for example, the Court unanimously rejected the Government's claim that it was imposing a mere inconvenience by detaining mail found to be "communist political propaganda" and notifying the addressee that they could receive the mail by requesting it in writing. Although this requirement did not deny "ultimate access," the Court found that it violated the First Amendment because the affirmative obligation imposed by the law was "almost certain to have a deterrent effect" on the exercise of First Amendment rights. As Justices Brennan, Goldberg and Harlan explained in their concurring opinion, "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." 381 U.S. at 309 (Brennan, J., concurring). *See also NAACP v. Alabama*, 357 U.S. 449 (1958); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 557 (1963); *American Communications Association v. Douds*, 339 U.S. 382, 402 (1950).

b. *By requiring bookstores and others covered by the law to determine prior to the point of sale which materials are subject to the statute, the display law substantially burdens First Amendment rights.*

Virginia's display statute is far more burdensome than laws prohibiting sales to minors for a second reason. Persons covered by sale to minor statutes can comply by deciding *at the point of sale* whether the particular materials being purchased by a minor are subject to the statute (and, if the statute permits, the seller can take that particular minor's age into account). In contrast, because Virginia's display statute makes it unlawful even to display material covered by the statute, persons must comply with the statute *prior to displaying* it. For this reason, Virginia's display statute imposes very substantial burdens on the First Amendment rights of bookstores and other covered persons, and on the First Amendment rights of minors.

As we have explained, it is impossible for bookstores to review their entire inventory—which may include tens of thousands of books—prior to display to decide which materials are "harmful to minors." As a result many will comply with the statute by simply treating *all* materials with sexually explicit content as subject to the statute's requirements. Even if bookstores try to minimize their burden by applying the law in this very broad manner, however, they must still review their entire inventory to decide which books and other materials contain some sexually explicit discussion or depictions. The result of this burden may be still broader censorship, including restrictions imposed on entire categories of expression to avoid undertaking the onerous task of reviewing each and every work sold in a store. In *Smith v. California*, 361 U.S. 147 (1959), the Court recognized the practical effect of laws that force booksellers to either review their entire inventory or sell material at their peril:

> The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.

361 U.S. at 153-154.

In the context of obscenity laws, the Court has found that First Amendment rights can be safeguarded by restricting those laws to persons who knew the "content and character" of the materials they distributed. This scienter requirement has important limitations: a defendant can be convicted without knowing that the materials are legally "obscene," *Hamling v. United States*, 418 U.S. 87, 123 (1974), and some courts have held that a defendant need not be aware of the contents of the specific materials at issue, F. Schauer, *The Law of Obscenity* 225 (1976); if the defendant's business has also distributed many other materials that are "hard core" or "arguably obscene" this may provide sufficient notice to satisfy the scienter requirement. *See, e.g., id.* at 225; *State v. Hull*, 86 Wash.2d 527, 546 P.2d 912, 921 (1976). Despite these limitations, in the obscenity context the scienter requirement provides significant protection to First Amendment rights because booksellers and others know that if they do not distribute a significant amount of "hard core" materials, they need not review all the materials in their inventory to be sure that none is obscene.

The State apparently assumes that the scienter requirement in its display statute affords the same protection because booksellers and others covered by the statute can only be convicted if they had "general knowledge" or "reason to know" the "content and character" of mate-

rials displayed in violation of the statute. Va. Code § 18.2-390(7). This assumption ignores the fundamental difference between obscenity laws and display laws regulating material that is "harmful to minors." In contrast to obscenity laws, booksellers cannot protect themselves from the reach of display laws by avoiding display of "hard core" materials. Instead, as the lower court found, as much as 25% of the average bookstore's inventory falls within the statute's definition of "harmful to minors"—a fact that, under the scienter doctrine developed in the obscenity context, puts booksellers on notice of the "content and character" of material in their stores. Accordingly, despite the inclusion of a scienter requirement in Virginia's display statute, booksellers run a substantial risk of prosecution and conviction unless they constantly review their stores' entire, changing inventory *prior to display* to insure that materials "harmful to minors" are not displayed.

This advance determination not only severely burdens the constitutionally protected activities of persons covered by the statute, it also substantially restricts the access of minors to speech that is constitutionally protected, even as to them. In contrast to the particularized decisions permitted by sale to minor statutes, Virginia's display law will force many persons covered by the statute to either prevent minors from having access to *any* material that includes sexually oriented content, or to prevent all minors from having access to material that might be harmful to minors of any age. Thus, although the State is only interested in denying minors access to a "miniscule amount" of material, the statute's effect will be to burden substantially the First Amendment rights of minors.[16]

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[16] *See Erznoznik*, 422 U.S. at 212-13 ("minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.").

III. LAWS RESTRICTING THE DISPLAY OF MATERIALS DEEMED "HARMFUL TO MINORS" THREATEN THE EXERCISE OF FIRST AMENDMENT RIGHTS IN THE NATION'S LIBRARIES.

The burdens imposed by Virginia's display statute, and similar statutes enacted in other states, are matters of grave concern to the nation's libraries and librarians. On its face, the Virginia statute prohibits only displays for "commercial purposes," and thus does not *directly* regulate display of reading materials in libraries. For several reasons, however, the constitutionality of Virginia's display law is a matter of the utmost concern to librarians.

In contrast to Virginia's law, display laws passed by some other states are not limited to displays for commercial purposes. *E.g.*, Ariz. Rev. Stat. Ann. § 13-3507. If the Court holds that Virginia can constitutionally impose criminal penalties on commercial establishments for displaying materials deemed harmful to minors, then states almost certainly may impose the same burdens on public libraries. Indeed, a number of courts have struck down statutory exemptions that protect libraries from the burdens of display laws, holding that such exemptions violate the Equal Protection Clause. *E.g.*, *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780, 785-86 (Colo. 1985) (en banc).

Even in states where libraries are exempted from display statutes, and these exemptions are upheld by the judiciary, display laws will necessarily have an inhibiting effect on libraries. History has taught librarians that when speech activities are not tolerated in private settings, attempts to engage in those same activities in public libraries are likely to generate outrage by vocal segments of the public, resulting in censorship. As noncommercial enterprises that depend on the support of the public, libraries do not have the incentive, the resources, or the inclination to fight prolonged battles against such public pressure, and many will instead modify their be-

havior to conform with the standards imposed on private enterprises.

Librarians are also well aware that, just as they cannot afford to ignore display statutes, the burdens of compliance with display statutes pose extraordinary difficulties. The books and other reading materials in libraries, like those in bookstores, include a vast amount of material with some sexually explicit content. This should be neither surprising nor disturbing, for as this Court recognized in *Roth v. United States*, 356 U.S. 476, 487 (1976), "[s]ex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing human interest throughout the ages; it is one of the vital problems of human interest and public concern." Requiring libraries to devote a substantial portion of their limited resources to reviewing their entire collections to determine which materials are sexually explicit, and then to determine which sexually explicit materials are and are not suitable for minors, would be completely antithetical to the purpose of libraries, and would be administratively impossible. For most libraries, operating under severe budgetary constraints, the resources required to even try to comply with such laws would leave little or no funds available to purchase or maintain collections.

Implicit in Virginia's limitation of its display statute to commercial institutions is a recogition that the display statute imposes extraordinary burdens, burdens that cannot be reconciled with the freedoms that libraries are intended to safeguard, embody and foster. This Court should emphatically reject the State's contention that the Constitution permits such burdens to be imposed on constitutionally protected speech activities. Whether imposed on libraries or other enterprises engaged in protected speech activity, the imposition of those burdens violates the First Amendment.

CONCLUSION

For the foregoing reasons, the lower courts correctly determined that Virginia's display law substantially and impermissibly burdens the First Amendment rights of adults, minors, and persons and enterprises subject to the statute. The State's attempt to trivialize these burdens by suggesting that the statute will be voluntarily restricted to serving the very narrow interest claimed by the State amounts to nothing more than an assertion that persons covered by the statute can disregard the law's literal requirements and hope that law enforcement officials will look the other way. This belief that the possibility of enlightened law enforcement adequately protects the right of free speech fundamentally misconceives this Court's First Amendment jurisprudence, which has long recognized that First Amendment freedoms are as fragile as they are precious. *See, e.g., Roth v. United States*, 354 U.S. 476, 488 (1957). First Amendment freedoms cannot be made subject to essentially unreviewable administrative discretion, however well-intentioned. *E.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). The Virginia display statute, both by its terms and by its foreseeable effects, substantially burdens constitutionally protected rights and violates the First Amendment.

Respectfully submitted,

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